IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.41 OF 2005
IN
GUARDIANSHIP PETITION NO.100 OF 2004

1. Zaveed Pharukhi

2. Shirlina Mohammed,

Both having their residence at 1720, Crownover Road, Houston Texas 77080 and presently at C/o Pramila Farooqui, 198, Aram Nagar, Part II, Versova Road, Andheri (West) Mumbai.

3. Abdul Kadir Karim Shaikh

4. Zakiyab Abdul Kadir Shaikh,

Both permanently residing at Room No.1, Ganesh nagar, B.J. Road, Bandstand, Bandra (West), Mumbai - 50. ....Appellants Original Petitioners

Mr.Riyz I. Chagla with Mr.S.N. Vimadalal i/b Vimadalal & Co. for the Appellant.

Mrs.Madhavi Diwan - Amicus Curie.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 24TH FEBRUARY, 2005.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

1. This is an Appeal against the order of the

learned single Judge dated 30th November, 2004, dismissing the Appellants' Petition. The Appellants have filed the Petition for an order declaring Appellant Nos.1 and 2 as guardians of the ward viz. newly born baby boy namely FARAZ (formerly known as "Sohail") ; for an order declaring that Appellant Nos.1 and 2 have the legal exclusive and valid custody of the said child and for an order declaring that Appellant Nos.1 and 2 as such will be entitled to take him out of the country to their place of residence.

2. Appellant No.4 is the wife of Appellant No.3. Appellant No.2 is the wife of Appellant No.1.

3. Appellant No.1 is a citizen of India. Appellant No.2 is a citizen of the United States of America (U.S.A.). Appellant Nos.1 and 2 reside in U.S.A. At present they reside in Canada and desire to take the child to Canada. Appellant Nos.1 and 2 were married on 2st January, 1998. Appellant Nos.1 and 2 have no children. During their visits to Mumbai, they used to stay with the brother-in-law of Appellant No.2 one Subhash Ghai. One Aasia was working as a domestic servant at the said Subhash Ghai's residence for several years. She was aware that Appellant Nos.1 and 2 did not have children and were desirous of adopting

a child. Aasia also knew Appellant Nos.3 and 4. She was aware that Appellant Nos.3 and 4 had a fourth child i.e. the said child and that they were finding it difficult to provide for him. Appellant No.3 is a labourer who mainly does household chores. Appellant No.4 is a housewife. Appellant Nos.3 and 4 have had no formal education and are illiterate. Their income is extremely low. In addition to the said child, Appellant Nos.3 and 4 also have three other children viz. Roobina, Farook and Iqbal born on 13th April, 1992, 8th August, 1994 and 28th May, 1999 respectively. It is stated that they are not in a position to maintain all the children. They were informed by Aasia that Appellant Nos.1 and 2 were desirous of adopting a child. Appellant Nos.3 and 4 were unable to look after even the first three children. It is submitted that they are finding it difficult to provide for the fourth child. They therefore, considering the welfare of the child, consented and agreed to give the said child in adoption to Appellant Nos.1 and 2.

4. In the circumstances, admittedly with the consent and free will of Appellant Nos.3 and 4, Appellant Nos.1 and 2 adopted the said child by a ceremony as per their custom on 29th May, 2004.

5. There is no doubt as to financial ability of Appellant Nos.1 and 2 to provide for and take adequate care of the said child. Appellant Nos.1 and 2 are collectively worth about US Dollar 4,000,000/-. They have produced several documents in respect of their financial status which we will refer to shortly. From the record we are also satisfied that Appellant Nos.1 and 2 are persons of good character with a stable relationship. They will certainly be able to provide a balanced, comfortable, conducive environment for the growth and development of the child.

6. That Appellant Nos.3 and 4 have willingly and voluntarily consented to give the said child in adoption to Appellant Nos.1 and 2 is also clear. We hasten to add that while this aspect certainly weighed with us in allowing this Appeal and therefore the Petition, it was incumbent upon us to satisfy ourselves on certain crucial and important aspects which we shall advert to after referring to various documents referred to and relied upon by the parties.

7. Appellant Nos.1 and 2 produced various documents as enumerated below :-

a). Their personal photographs.

b). Their passports.

c). Their marriage certificate.

d). An application to the Canadian Authority to sponsor a child in the family by Appellant No.2. It was for the purpose of immigration to Canada.

. The above application has been processed and Appellant No.2 has been allotted Client number and kit I.D. dated 23rd July, 2004. The application clearly states the relationship of the child to the sponsor i.e. Appellant No.2, as an adopted child.

e). Reference letter from one Subhash Ghai stated to be a well known film personality.

f). Reference letters from one Jagjit Singh, stated to be a well known singer and one Sanjay Narayan, Principal Secretary and CPO, General Administration Department, Mantralaya, Mumbai.

. Each of these persons have certified that they have known Appellant Nos.1 and 2 for several years and they are of good standing in the community morally and socially ; that they have also served many charitable organizations both in the USA and in Canada ; that both individuals will be good parents and will provide the necessary love and attention that

is required to the said child.

g). Certificate addressed by Quari Hosein Auckbaralee (Hon. President Nur-E-Islam Society of Canada) certifying that the Canadian law applies to all religions, races or creeds and does not prohibit adoption ; that he is a leader of the community in Canada ; he has been President of the society for 17 years and Vice President for eight years in Canada and that muslims in Canada are entitled to adopt children.

h). Certificate issued by the Imaam of The Toronto And Region Islamic Congregation certifying that Islam does not prohibit or prevent Appellant Nos.1 and 2 from legal guardianship or foster of a child or children.

i). Certificate issued by Imaam Shaffie Mohammed Scarborough Islamic Dawa certifying that he has known Appellant Nos.1 and 2 for about ten years ; that Appellant Nos.1 and 2 are very loving and kind hearted and that according to Canadian law adoption is permitted.

j). Certificate issued by the police office of Quebec, Canada in respect of Appellant Nos.1

and 2 certifying that there was no criminal record against either of them.

k). Certificate issued by the Advocates and Notaries LACROIX & COTE, QUEBEC, CANADA certifying that he knows Appellant No.2 as a customer ; that Appellant No.2 is the only shareholder and administrator of the company which owns three buildings of the aggregate value of 24,00,000 Canadian Dollar.

l). A bank statement of BANK ONE, Los Angeles indicating a combined balance US $ 313,976 in their accounts.

m). Letter dated 14th February, 2005 from one Dr.Andre Larochelle certifying that there is no Family Advisory Bureau in the near vicinity ; that he has known Appellant Nos.1 and 2 and as well as their family background and status in society and as their family doctor had discussed personal matters with them from time to time ; that Appellant Nos.1 and 2 have a good family background and have respectable social status.

n). Certificate of Mr.Pierre Cote, Psychologist, Quebec stating that he has evaluated their psychological ability and competency to bring up a child and certifying that Appellant

Nos.1 and 2 are mentally fit and their parental competency.

o). Certificate issued by one Gilles Bergeron, Director General, Guebec certifying that they had conducted a home study report of Appellant Nos.1 and 2 and found that they have sufficient residential facility in Canada and that the area has excellent schooling facilities ; that they have marital harmony between them and have friendly and peaceful relations with their neighbours.

p). Certificate issued by the said Notary stating that she was going to begin the Canadian procedures of adoption after the child arrived in Canada

q). A letter addressed by the office of the City of Chicoutimi (residence of Appellant Nos.1 and 2 in Canada) certifying that appellant Nos.1 and 2 were carrying on business in real estate and that they were respectable residents with good social and financial status.

r). Application procedure for issuing visas including for adopted child.

8. Although the Petition was jointly filed by both the sets of parents, in view of the importance and sensitive nature of the matter, one of us while sitting singly earlier (S.J. Vazifdar, J.) had requested Mrs.M.S. Diwan to act as an amicus-curie. Mrs.Diwan had agreed to do so. She continued appearing as amicus-curie even before us. Before going any further, we would like to express our appreciation to both the learned counsel for their assistance and research not only of the law but also the procedure required in the present case. We have, after hearing Mrs.Diwan, provided several safeguards which are always necessary in such matters. On her recommendations further documents were called for which Mr.Chagla readily produced before us at subsequent hearings.

9. The learned Judge dismissed the Petition on the ground that merely because Appellant Nos.3 and 4 have consented to the appointment of Appellant Nos.1 and 2 as guardians of the child, the same could not be allowed. The learned Judge further held that merely because Appellant Nos.3 and 4 are very poor and that Appellant Nos.1 and 2 are affluent did not warrant the Petition being allowed. He held that the natural love and affection of the parents creates a proper

atmosphere and circumstances for the purpose of good up-bringing of the child ; that three children are already with Appellant Nos.3 and 4 and were being looked after and cared for and therefore it is not possible to hold that Appellant Nos.3 and 4 were not capable of performing their parental duties and/or were not fit to perform their duties towards the fourth child. The learned judge held that in view of Section 19(b) of the Guardians and Wards Act, 1890 it is improper to allow any person other than Appellant Nos.1 and 2 to be appointed as guardians of the child unless the Court came to the conclusion that the parents were unfit to be guardians of the child.

10. It is appropriate therefore at this stage to set out some of the provisions of the Guardians and Wards Act, 1890 (hereinafter referred to as the "said Act").

> **"7. Power of the Court to make order as to guardianship.-**
>
> (1) Where the Court is satisfied that is for the welfare of a minor that an order should be made -
>
> (a) appointing a guardian of his person or property, or both, or
>
> (b) declaring a person to be such a guardian, the court may make an order

accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian a pointed or declared as aforesaid have ceased under the provisions of this Act.

17. Matters to be considered by the Court in appointing guardian. -

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

19* * *

(5) The Court shall not appoint or declare any person to be a guardian

against his will.

19. Guardian not to be appointed by the Court in certain cases.-

Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person -

(a) of a minor who is a married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person, or

(b) 20* * * of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

11. It is important to note in the first instance the judgment of the Supreme Court in the case of *Anokha v. State of Rajasthan (2004) 1 Supreme Court Cases 382.* The child of the Petitioner was sought to be adopted by Respondent Nos.2 and 3. The Petitioner’s husband was a taxi driver. Respondent Nos.2 and 3 were Italian nationals. During their frequent visits to India they used to hire the Petitioner’s husbands taxi. The Petitioner’s husband expired as a result of an accident. The Petitioner had six children. Respondent Nos.2 and 3 had no

children and wanted to adopt one of the Petitioner's children. Respondent Nos.2 and 3 therefore filed a Petition under Sections 7, 10 and 17 of the 1890 Act in the Court of the District Judge, Alwar stating that they were financially well off and that they would love the child and provide all necessary formalities. In support of the Petition various documents were filed to establish the bona-fides and suitability of Respondent Nos.2 and 3 to take the child in adoption. The District Judge held that the adoption ought to be affected by following the guidelines prescribed for "Adoption of Indian Children" issued by the Ministry of Welfare, Government of India. The guidelines required that the child must be sponsored by a social or child welfare agency recognized or licensed by the Government of the country in which the foreigner is a resident. It was therefore held that unless an authorised agency in Italy submitted an enquiry report and a "no-objection certificate" was issued by the Ministry of Welfare, Government of India, no application for appointment of foreigners as guardians could be presented to the court. In appeal, the High Court upheld the judgment. The High Court held that Respondent Nos.2 and 3 would have to get a no-objection certificate from the Central Adoption Resource Agency (CARA).

12. The Supreme Court held that the impugned judgments erred in not considering the material produced by Respondent Nos.2 and 3 in support of their application. It was held that the guidelines issued in a number of decisions of the Supreme Court the first of which is in the case of *Lakshmi Kant Pandey v. Union of India (1984) 2 SCC 244*, did not apply in those cases where the children were staying with the biological parents. This is clear from the following observations :

> "8. The original decision of the Court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed not only by the Indian Council of Social Welfare but also by foreign organisations and Indian organisations which were engaged in offering and placing Indian children for adoption by foreign parents. The decision has referred to three classes of children : (i) children who are orphaned and destitute or whose biological parents cannot be traced ; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption ; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such

class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents". The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the chid. That is the greatest safeguard.

10. The aforesaid observations only pertain to children who have been or are sought to be relinquished or surrendered for adoption in general to a placement agency or other institution where there is no contact between them and the adoptive parents at all and not to cases where the child is living with his/her parent/parents and is agreed to be given in adoption to a particular couple who happen to be foreigners.

11. This decision has been subsequently modified but reaffirmed in several decisions. In all the subsequent cases, the modification, if any, has pertained to adoptions through institutions i.e. the first or second category of children. (See Laxmi Kant Pandey v. Union of India, Laxmi Kant Pandey v. Union of India, Laxmikant Pandey v. Union of India, Sumanlal Chhotalal Kamdar v. Asha Trilokbhai Shah, Karnataka State Council for Child Welfare v. Society of Sisters of Charity St.Gerosa Convent, Indian Council Social Welfare v. State of A.P. and Laxmi Kant Pandey v. Union of India.)

12. The Guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to be followed in respect of the

> third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is the impersonalized attention of a placement authority that there is a need to closely monitor the process including obtaining of a no-objection certificate from the Central Adoption Resource Agency (CARA), Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the Guidelines for the purpose of eliminating the malpractices indulged in by some unscrupulous placement agencies, particularly the trafficking in children." (emphasis supplied)

13. It is thus clear that as far as the present case is concerned CARA guidelines do not apply. In fact in *Lakshmi Kant Pandey v. Union of India AIR 1984 SC 469*, the Supreme Court itself made it clear that the judgment did not apply to cases of adoption of children who are living with their biological parents. The Supreme Court held as under :-

> "11. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in

> adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare." (emphasis supplied)

14. The law regarding cases of adoption of children living with their biological parents who are sought to be given in adoption to a known couple willingly by the biological parents themselves is governed by the judgment of the Supreme Court in *Anokha's* case. In paragraph 15, the Supreme Court held as under :-

> "15. None of these provisions in the several decisions of this Court impinge upon the rights and choice of an individual to give his or her child in adoption to named persons, who may be of foreign origin. The Court in such cases has to deal with the application under Section 7 of the Guardians and Wards Act, 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily after being aware of the implication of adoption viz. that the child would legally belong to the adoptive parents' family, uninduced by any extraneous reasons such as the receipt of money etc. ; that the adoptive parents have produced evidence in support of their suitability and finally that the arrangement would be in the best of the child." (emphasis supplied)

15. In *Anokha's* case the Supreme Court has also provided the guidelines for the nature of evidence

necessary to satisfy the Court regarding the desirability of permitting such applications and the undertakings to be given by the parties and safeguards to be provided by the Court. However, it is clear that the Supreme Court has categorically stated that in cases such as the one before us, the Court has to deal with the application under Section 7 of the said Act. It is necessary for the Court to be satisfied that the child is being given in adoption voluntarily; that the biological parents are aware of the nature and consequences of their act namely that the child would legally belong to their adoptive parents and that the act of the parties is not induced by any undesirable extraneous reasons such as the receipt of money.

16. We are entirely in agreement with Mrs.Diwan that an order allowing the adoption or permitting the persons other than the biological parents to be appointed as the guardians of a child ought not to be passed mechanically. Matters such as these cannot be treated like applications for consent decrees. Nor can they be permitted except for valid and desirable reasons. Indeed such orders ought not to permit a sale of children. Nor should parents be permitted to abdicate their duties of providing for their children

not merely financially but emotionally as well. It is necessary to realize that orders such as these do not merely affect the parties to the application but primarily affect the child. The object ought not to be merely monetary. Socially and psychology to remove from the child from the custody of the biological parents is a matter of utmost importance. The Court necessarily has to weigh cases such as these very carefully in the balance.

17. In the present case, we are satisfied that the intention of the parties is bona-fide and genuine and that the application ought to be granted for valid reasons.

18. Firstly there is little doubt that Appellant Nos.1 and 2 are suitable adoptive parents. Indeed the learned Judge has not found them to be otherwise. The above documents indicate that they are persons of good character and standing socially. Their financial ability to look after the child is established. We must note here that throughout the hearing Mr.Chagla readily agreed several suggestions made by us regarding to obtaining additional information and securing the interests of the child including financially.

19. We are also satisfied that Appellant Nos.1 and 2 intend completing the process of legally adopting the child in Canada. In fact as in *Anokha's* case, though the CARA guidelines do not apply the documents referred to above virtually satisfy the requirements of a home study report.

20. The documents furnished in *Anokha's* case were not as per any rigid formula. Indeed the nature of the documents would differ from country to country depending on where the child is proposed to be taken. Each country would naturally have its own procedures and requirements. The parties must satisfy the Court in each case regarding the nature and sufficiency of documents and evidence and the validity thereof.

21. There is no doubt that Appellant Nos.3 and 4 have voluntarily agreed to appoint Appellant Nos.1 and 2 as guardians. Appellant Nos.2 and 4 were in fact present during the hearing.

22. Nor is it difficult to understand in the facts and circumstances of the case, why Appellant Nos.3 and 4 have consented to Appellant Nos.1 and 2 being the guardians and adoptive parents of the child.

Appellant No.3 is a domestic worker with a very meagre income. They have four children including the said child. The first three children are 13, 11 and 6 years old respectively. They will be dependent on Appellant Nos.3 and 4 for many years to come. The youngest of them will be dependent on Appellant Nos.3 and 4 for at least another 12 to 15 years. Appellant Nos.3 and 4 have stated that they are not in a position to maintain their children. We see no reason to disbelieve them. Appellant Nos.3 and 4 have by no means abdicated or neglected to discharge their duties as biological parents by consenting to this petition. Indeed they have made an enormous sacrifice the nature of which requires no elaboration. It would be unkind to equate such a sacrifice to an abdication of parental duties. At the cost of repetition we must recall the words of the Supreme Court in *Laxmi Kant Pandey's* and *Anokha's* cases :-

> "We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents".

. In the facts of this case we are unable to fault their decision for any reason.

23. We are entirely in agreement with the learned Judge that merely because Appellant Nos.1 and 2 are financially well off, the Court ought not to appoint them as the guardians of the minor child. The fact that a party is financially well off can never be the sole consideration for an order appointing them as guardians. It is but a factor to be taken into consideration while deciding whether or not they would be able to provide for the child. Parents cannot be permitted to give their children in adoption without good cause. The importance of the role of the biological parents in every respect cannot be over stated. The importance of this aspect requires no elaboration for it is too obvious. If parents are allowed to give their children in adoption freely and without just cause, it would undoubtedly adversely affect the children emotionally and psychologically. In the ultimate analysis, the welfare of the child is of paramount important. This principle underlines the entire Act of 1890.

24. Even assuming that the judgment in *Anokha's* case is not binding in the facts and circumstances of the present case, were are of the view that the Petition ought to have been allowed.

25. A distinction must be drawn in the approach of a Court while considering applications made with the consent of biological parents and contested applications. There cannot be any rigid formula for determining the welfare of the child. It must be determined keeping in mind the totality of circumstances.

26. Applying these principles, we are unable to agree with the learned single Judge that the only basis on which the present application is made is that the biological parents are poor and that Respondent Nos.1 and 2 and the biological parents have consented to the application. In the facts of this case, it cannot be said that the biological parents have without due consideration merely abdicated their duties as parents to care for the child. The record indicates that they will not be able to take care of the child despite their best intention to do so. In such a case even assuming that the rigours of Section 19 of the said Act are to be applied, we would be inclined to allow this application not because we have come to the conclusion that the biological parents are "unfit" in any pejorative sense but in a functional sense.

27. Thus considering all the facts and circumstances of the case, in our view the Petition ought to be allowed.

28. The learned single Judge did not consider himself bound by the judgment of the Supreme Court in *Anokha's* case. Firstly he held that *Anokha's* case was distinguishable on the ground that the father in that case had expired. Secondly the learned single Judge held that in *Anokha's* case there was no discussion pertaining to the scope of Section 19 because the issue did not arise in that case and therefore the provisions of Section 19 of the said Act did not apply.

29. It would not be proper on the part of the High Court to distinguish the judgment of the Supreme Court in *Anokha's* case for these reasons. The ratio of the judgment in *Anokha's* case did not turn solely on the fact that the father had expired. The observations of the Supreme Court specially in paragraph 5 of the Judgment are not limited to cases where the father has expired. Had that been so, the basis of the judgment would have been different and specifically on that point.

30. We are unable to agree with the basis on which the learned single Judge has distinguished *Anokha's* case. The learned single Judge has distinguished *Anokha's* case solely on the ground that in that case the father of the child had expired and therefore, the provisions of Section 19 (b) of the said Act did not even fall for the consideration of the Supreme Court.

(b). The attention of the learned single Judge was not invited to the judgment of the Supreme Court in *Gita Hariharan (Ms) and another v. Reserve Bank of India and another, (1999) 2 SCC 228*. From this judgment, it is clear that it would have made no difference in *Anokha's* case whether or not the father was alive so long as the mother was also alive. In *Gita Hariharan's* case the Appellant had challenged the constitutional validity of Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of Guardians and Wards Act, 1890. It was contended that the sections are violative of the Constitution inasmuch as the mother of a minor is relegated to an inferior position on ground of sex alone since her right as a natural guardian is made cognizable 'after' the father in the said position. The Supreme Court upheld the Constitutional validity of the sections on

a true and proper construction of the said provisions. Section 6(a) of the Hindu Minority and Guardianship Act, 1956 reads as under :-

> "6. The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -
>
> (a) in the case of a boy or an unmarried girl - the father, and after him, the mother : Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

(c). The Supreme Court held that if the word "after" in the section means only "upto the life time", the section would have to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The Supreme Court however held that on a proper construction the word "after" did not necessarily mean "after life time". It could also mean "in the absence of". It was further held that the term would also refer to the father's absence from the care of the minor's property or person for any reason whatever, such as, if the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the

latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor for any reasons. The same however could be only during his life time.

. Thus, even during the life time of the father, the mother could also be considered in certain circumstances to be the natural guardian. The mere fact that in *Anokha's* case the father had expired, would not therefore make any difference to the binding effect of the judgment in *Anokha's* case and its applicability to the present case.

(d). The Supreme Court held as under :-

> "7. The expression "natural guardian" is defined in Section 4(c) of the HMG Act as any of the guardians mentioned in Section 6 (supra). The term "guardian" is defined in Section 4(b) of the HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the definitions of "guardian" and "natural guardian" do not make any discrimination against mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The only provision to which exception is taken is found in Section 6(a) which reads "the father, and after him, the mother".

(emphasis ours) That phrase, on a cursory reading, does give an impression that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. In fact, that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that the welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court, where to do so would be in the interest of the welfare of the minor.

8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word after in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as the guardian of the minor during the lifetime of the father, without the matter going to the court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a) (supra). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only after the lifetime of the father and not during his lifetime.

9. Is that the correct way of

understanding the section and does the word after in the section mean only after the lifetime ? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, t e statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

10. We are of the view that Section 6(a) (supra) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean after the lifetime. In the context in which it appears in Section 6 a) (supra), it means "in the absence of', the word "absence" therein referring to the father absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor **even if he is living** with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor,

or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a) (supra).

15. Similarly, Section 19(b) of the GW Act would also have to be construed in the same manner by which we have construed Section 6(a) (supra).

16. While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid **even during the lifetime of the father,** who would be deemed to be absent for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act".

(e). Thus it is not that in *Anokha's* case Section 19(b) so read was inapplicable. The father having expired the mother was the natural guardian. Section 19(b) is required to be read as including the mother as a natural guardian even during the lifetime of the father in certain circumstances. It follows therefore that even in the facts of *Anokha's* case Section 19(b) did operate. It is not possible therefore to hold that in *Anokha's* case the question of Section 19(b) did not arise. The ratio of the judgment in *Anokha's* case cannot therefore be said to have depended solely on the fact that the father was not alive. For even so the mother was alive and Section 19 of the Act was therefore as much applicable as it would have been if the father was alive.

31. The learned Judge also distinguished the judgment of the Supreme Court in *Anokha's* case stating that the only ground on which the application in that case was rejected by the lower Court was based on the guidelines framed by the State Government in pursuance of the judgment of the Supreme Court in *Lakshmi Kant's* case (supra).

32. The judgment however, must be read for what it holds. It is not permissible for us to conjuncture

the reasons for which the ratio has been laid down in the judgment. There is nothing to suggest that the only basis on which the judgment in *Anokha's* case rested was to overrule the judgment of the lower Court only in so far as the lower Court rejected the application as the guidelines framed by the State Government had not been complied with. The judgment in *Anokha's* case went further. We therefore hold that the learned single Judge was in error in not following the judgment of the Supreme Court in *Anokha's* case.

33. The learned single Judge considered himself bound by a judgment of another learned single Judge in the case of - *Mohammed Shafi v. Shamin Banoo, AIR 1979 Bombay 156* and in particular the observations in paragraph 11 thereof which reads as under :-

> "11. Both Ss. 7 and 19 of the Act are in Chap. II. Therefore, the power which is conferred under S.7 to appoint a guardian is deemed to be controlled by the provisions of S.19 disentitling a Court to appoint or declare a person a guardian of a minor, unless in the case of a minor whose father is living, the Court comes to the conclusion that such father is unfit to be a guardian of the person of the minor. A reading of the order passed by the learned Judge as also the points raised by him for determination show that the learned Judge has overlooked the provisions of S.19 and has not considered the question whether the respondent was

> an unfit person to be appointed as a guardian".

34. The judgment has no applicability to the facts of this case. In that case there was a dispute between the husband and the wife. The mother had filed an application for appointing herself as a guardian and for the custody or returning the minors to her custody on the ground that her husband had treated her cruelly and on the ground that the husband had married another lady who together with the husband were treating the children in an extremely cruel manner. In these circumstances it was contended on behalf of the Appellant that before a person other than the father could be appointed as a guardian, the Court ought to have recorded a finding that such person is not a fit person to be appointed as a guardian. It was not a matter where an application was made by consent as in the present case and as in *Anokha's* case.

35(a). The learned Judge referred to the following observations from the judgment of the Privy Council in the case of *Mrs.Annie Besant v. G. Narayaniah, AIR 1914, Privy Counsel* :-

> "And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards

> Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case".

(b). In view of what we have held earlier, the observations of the Privy Council do not disentitle the Appellants to the reliefs claimed by them.

(c). This too was a contested matter. The question before us did not arise in *Annie Besant's* case. The facts in *Annie Besant's* case were somewhat peculiar. The Respondent had accepted the Appellant's offer to take charge of his two minor sons and defray the expenses of their maintenance and education in England and at the University of Oxford. The Appellant did in fact arrange for the education of the two children J.Krishnamurti, who later became a renowned philosopher and Nityananda. Thereafter the Respondent sought to cancel his previous letter appointing the Appellant as the guardian of the children and demanded that they be restored to his custody. The Respondent filed a suit for a declaration that he was entitled for guardianship and custody of the sons, that the Appellant was not entitled to, or in any case was unfit to be in charge and guardianship and custody of his sons and for an order on the Appellant to hand over his sons to him or

such other person as the Court might seem fit.

. The question before the Privy Council was whether in the event which had happened the Respondent was at liberty to revoke his earlier decision placing the children in the Appellant's charge. It appears that the trial Judge found certain difficulties by reason of the fact that the suit was not such as to make the infants wards of Court, and that the elder infant would within a short time attain majority. These difficulties were sought to be overcome by declaring the infants wards of Court and declaring under Section 7 of the Guardians and Wards Act, 1890 that the Respondent was their guardians.

. The Privy Council held that it was not competent for the trial Court or the High Court to have adopted this procedure. The Privy Council held that an order declaring a guardian could only be made if their interests required it, and, as they were not before the Court nor were their interests adequately considered such a order could not have been made. The observations of the Privy Council referred to by the learned Judge and extracted by us followed the aforesaid discussion. It is however, pertinent to note that thereafter the infants obtained the leave of

the Privy Council to intervene and expressly stated that they did not desire to return to India.

(d). To divorce the observation of the Privy Council relied upon by the learned Judge from the rest of the judgment would not lead to a proper appreciation of the judgment. Moreover in any event the judgment of the Supreme Court in *Anokha's* case squarely applies to the facts of the case before us and we are bound by the same.

36. Mrs.Diwan invited our attention to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 and in particular Articles 2, 4 and 17 thereof. She submitted that the convention came into force in India on 1.10.2003 and that CARA has in fact been notified as the Central Authority. However, *Anokha's* case was decided thereafter. Though it does not refer to the convention, the judgment is binding on us especially as it specifically stipulates the provisions of law to be applied and the approach to be adopted in such cases.

37. Mrs.Diwan suggested, inter-alia referring to *Anokha's* case, various safeguards which ought to be

provided. We appreciate her assistance and are entirely in agreement with her submissions in this regard and have incorporated the same in our order.

38. In the circumstances and based on our having accepted the undertakings given by the Appellants as recorded in this order and in the pleadings filed in this Court, the following order is passed :-

i). The impugned order is set-aside. The Petition is made absolute in terms of prayers (a), (b), (c) and (d).

ii). Before the child is taken out of the country the following conditions must be complied with :-

a). Appellant Nos.1 and 2 will file an affidavit in this Court containing an undertaking to adopt the child in accordance with the laws of Canada within two years and to produce the child if so required, till proof of adoption is filed in this Court. The said affidavit shall also contain an undertaking to submit annual reports to

this Court of the child's welfare and progress in school with photographs and to inform this Court of any change of address till the child is legally adopted.

b). Appellant Nos.1 and 2 shall deposit in this Court a sum of Rs.3,00,000/- to cover the air fare for the possible repatriation of the child to India till the child is legally adopted. The Prothonotary and Senior Master shall invest the said amount in fixed deposit in any nationalised bank for a period of six months and thereafter for like periods of six months each pending further orders. Liberty to Appellant Nos.1 and 2 to apply for refund of the amount upon proof of their having adopted the said child in accordance with the applicable law.

iii). The Prothonotary and Senior Master is directed to send two copies of this judgment together with copies of the affidavit of Appellant Nos.1 and 2 and the annexures thereto to CARA, Ministry of

Welfare, Government of India, one set of which is to be retained by CARA and the other forwarded by it to the relevant Indian Diplomatic Mission in Canada for their record in the event of any follow-up action becoming necessary. The Appeal is accordingly disposed of.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.41 OF 2005
IN
GUARDIANSHIP PETITION NO.100 OF 2004

DATE OF DECISION : 24TH FEBRUARY, 2005.

For Approval and Signature :

HON'BLE MR.JUSTICE A.P. SHAH.

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)